IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION PETITION NO.417 OF 2004

1. M/s.Urmila Construction Co. & others. ... Petitioners

vs.

Sushanku Builders Ltd. .... Respondents.

Mr.Shyam Diwan with V.N.Kantawala i/b. Kantawala & Co., for Petitioners.

Mr.A.A.Joshi i/b. C.J.Kambli, for Respondents.

CORAM: D.K.DESHMUKH,J.

DATED: 26th August,2005

P.C.:-

1. By this petition, the petitioners challenge the Award made by the sole Arbitrator directing the petitioners to pay certain amount. Admittedly, the parties had entered into an Agreement dated 16.9.1999. The pleadings about the terms of the agreement are to be found in paragraph no.2 of the Award. Clause 5 of the Agreement

contemplates that the respondents-claimant agrees to provide an additional finance of Rs.20 lakhs. According to the petitioners, that additional finance of Rs.20 lakhs was not paid and therefore, the petitioners terminated the agreement by letter dated 20.10.1999. Thus, the dispute arose between the parties. In the agreement dated 16.9.1999 there was no arbitration clause. According to the respondents, subsequently, the parties decided to enter into an arbitration agreement. The Respondents prepared the arbitration agreement and sent it by post to the petitioners. According to the Respondents, the petitioners had signed the agreement and sent it back to the respondents. Pursuant to this arbitration agreement, a reference was made to the learned Arbitrator. An objection was raised before the arbitrator in relation to the existence of the arbitration agreement. Before the learned Arbitrator, both the parties had led documentary and oral evidence and the learned Arbitrator has made the Award granting the claim of the Respondents. It is this Award which is under challenge.

2. The petitioner submits that according to the Respondents, a written arbitration agreement was prepared by the respondents and they sent it by post to the petitioners. It is an admitted position that the address on which that agreement was sent was not the address of the petitioners. The learned Arbitrator has recorded the finding that

the petitioners had signed the written arbitration agreement, by drawing inference on the basis of correspondence between the parties and by comparing the signatures of the petitioners. The submission is that while recording this finding the learned Arbitrator has ignored the relevant fact that the arbitration agreement was sent by the respondents to the petitioners on the address which admittedly is not the address of the petitioners.

3. It is further submitted that the petitioners had terminated the agreement by letter dated 20.10.1999 for failure of respondents to pay Rs.20 lakhs which were agreed to be paid under clause 5. The learned Arbitrator has recorded a finding that the occasion to pay Rs.20 lakhs under clause 5 did not arise by 20.10.1999 because by that date the buildings plans were not sanctioned by the planning authority. But while recording this finding, the learned Arbitrator has ignored the fact that the cheque of Rs.2 lakhs under clause 5 was issued by the Respondents in favour of the petitioners and in terms of Clause 5, the petitioners had issued a cheque of Rs.2,72,000/- in favour of respondents towards repayment. It is submitted that in recording the finding that the amount of Rs.20 lakhs as additional finance has not become payable, the fact that a cheque of Rs.2 lakhs was issued by the Respondents, was a relevant fact and the finding recorded by the learned Arbitrator ignoring the relevant fact is vitiated and is liable to

be set aside. It is further submitted that in the statement of claim the Respondents had claimed several reliefs. The learned Arbitrator has not granted those reliefs to the respondents. The learned Arbitrator by the Award has directed the petitioners to pay amount of Rs.70,00,000/- and further the amount of Rs.25,40,540/- to the Respondents. According to the petitioners, in the statement of claim itself the respondents have stated that the respondents had transferred and created third party rights in the construction which was raised and which is to be raised. But in the Award the learned Arbitrator has not taken into consideration the fact that the third party interest are admittedly created by the respondents, and therefore, the Award is liable to be set aside.

4. On behalf of the respondents, it is submitted that the finding is recorded by the learned Arbitrator, that on behalf of the petitioners the arbitration agreement was signed by comparing the signatures on the admitted documents and the signature on the arbitration agreement and by drawing inference from the correspondence available on record. It is submitted that the finding that has been recorded by the learned Arbitrator is a possible finding as also the finding of fact and therefore, this Court cannot disturb that finding in its limited jurisdiction under Section 34 of the Arbitration and Conciliation Act.

5. So far as the second ground is concerned, it is submitted on behalf of the Respondents that the learned Arbitrator has recorded clear finding that the amount of Rs.20 lakhs which was the amount of additional finance was to be paid for the purpose of construction and as the building plans were not sanctioned there was no occasion for the respondents to pay that amount. According to the learned Counsel, cheque of Rs.2 lakhs was issued by the Respondents in favour of the Petitioners, though under clause 5, as a concession. According to the learned Counsel, the finding recorded by the learned Arbitrator in this regard is the finding of the fact and it is the conclusion which is possible to be reached and therefore, according to the learned Counsel the Award cannot be disturbed.

6. So far as the third point is concerned, the learned counsel for the petitioners submit that the learned Counsel for the respondents fairly accepted that there is lacunae in the Award that it does not consider the creation of third party rights by the respondents and it also does not indicate as to what the petitioners have to pay in case the petitioners fail to pay the amounts that have been directed to pay to the respondents. The submission was that as this lacunae is capable of being cured, this Court may make an order under Sub-Section (4) of Section 34 of the Arbitration & Conciliation Act,1996. In view of the concession asked by the learned Counsel for Respondents and a

request made for remanding the proceedings back under Section 34(4) of the Act, the only question that is required to be considered is that whether the lacunae in relation to which the concession is made by the respondents, is the only lacunae in the Award. Perusal of the provisions of Sub-section (4) of Section 34 of the Act shows that recourse to that provision can be had if by adopting that course the ground for setting aside the award can be eliminated. The question therefore to be considered is, if this lacunae referred to above in the part of the Award is cured, the rest of the Award is not liable to be disturbed ? In my opinion, remand of the proceedings under Section 34(4) of the Act, is not likely to result in eliminating the ground for setting aside the Award. It is to be seen that the admitted position is that the petitioners had terminated the contract for failure of the respondents to pay amount of Rs.20 lakhs. The petitioners have stated that on behalf of the Respondents a request was made that amount of Rs.20 lakhs should not be demanded as the Respondents were facing financial difficulties and the petitioners were requested to accept presently a cheque of Rs.2 lakhs. Accordingly, a cheque of Rs.2 lakhs was issued by the Respondents and accepted by the petitioners. The Petitioners had also issued a cheque in the amount of Rs.2,72,000/- towards the repayment as required by Clause 5 of the Agreement. But the cheque of Rs.2 lakhs issued by Respondents was dis-honoured and therefore, the contract was terminated. Perusal of the Award shows

that the learned Arbitrator has recorded the finding that occasion to pay amount of Rs.20 lakhs had not arisen by the time the contract was terminated for non compliance of Clause 5. At this juncture, it is appropriate to see Clause 5 of the Agreement which reads as under:-

> "5. It is also agreed between the parties that the owners will require additional finance of Rs.20,00,000/- (Rupees Twenty lacs only) for completion of the construction on the said building on the said plot of land and the purchaser will provide finance to the tune of Rs.20,00,000/- (Rupees Twenty lacs only) to the owners on owners making a request in writing. The purchaser will provide the finance within 10 (ten) clear days. The owners will issue post dated cheque/s in repayment of the said amount in favour of the purchaser together with the amount of profit at 36% p.a."

The scheme of clause 5 is clear that the Respondents were required to pay amount of Rs.20 lakhs and the petitioners were to give post dated cheques in repayment of that amount and the repayment was to be made of the amount advanced together with the profit at the rate of 36% p.a. The learned Counsel appearing for Respondents also submitted before me that the cheque of Rs.2 lakhs which was given by

the respondents to the petitioners was given as per the requirement of clause 5, though according to him, it was given as concession. It is also admitted position before me that the cheque of Rs.2,72,000/- issued by the petitioners to the respondents also corresponds to the requirement of clause 5. The finding recorded by the learned Arbitrator in this aspect of the matter is to be found in paragraph 31 of the Award which reads as under:-

> "In such a situation, after getting all the benefits due to them under the agreement, which were valued at a sum of Rs.70 lakhs, the Respondents cannot get out of their obligation to repay the sum of Rs.70 lakhs to the Claimants by the purported termination of the agreement on the plea of dishonour of cheque of Rs.2 lakhs given by the Claimants by way of additional finance for development of the property in terms of Clause 5 of the agreement. According to me, it cannot be a ground for termination of the agreement. Moreover, the Claimants have also given cogent reasons for dishonour of the cheque in question. The admitted position is that even the building plan had not been approved by

> the MMC till the month of May,2000 due to non-payment of the amounts demanded by the MMC vide their letter dated 6th May,2000 (Exhibit 'C-15') for regularization of unauthorised constructions and approval of plans by the Respondents. The question of providing additional finance for the development of the property cannot arise in such a situation."

Perusal of the above quoted finding of the learned Arbitrator shows that though the Arbitrator has held that the cheque of Rs.2 lakhs was issued by the petitioners to the respondents in terms of clause 5 and though the learned Arbitrator has recorded the finding that payment under clause 5 had not become due by that date, the learned Arbitrator has not considered as to why in that situation the cheque of Rs.2 lakhs was given by the respondents to the petitioners. The submission of the learned Counsel appearing for Respondents was that the cheque was given as a concession. But even that case has not been considered by the learned Arbitrator. In my opinion, the fact that the cheque of Rs.2 lakhs was given in terms of clause 5 and the cheque of Rs.2,72,000/- was given by the petitioners to the respondents for repayment under clause 5 is therefore, a relevant fact for considering whether payment under clause 5 had become due or not. The learned Arbitrator could

have come to the conclusion that though the cheque of Rs.2 lakhs was given the payment under clause 5 had not become due, after considering the fact of issuance of cheque of Rs.2 lakhs. The learned Arbitrator has omitted to consider that and excluded from its consideration the relevant fact and therefore, in my opinion, the finding recorded by the learned Arbitrator violates the principle of natural justice. The principle of natural justice requires every judicial/quasi judicial authority to apply its mind to all relevant facts while recording findings. The omission to consider the relevant facts vitiate the finding. The finding of the learned Arbitrator that the payment of additional finance under clause 5 had not become due by the date on which the contract was terminated by the petitioners is vitiated and therefore, in my opinion the very foundation of the Award as such collapses.

7. I also find considerable force in the submissions advanced on behalf of the petitioners that as it was the case of the respondents that the arbitration agreement was signed by the respondents and it was sent by post to the petitioners for their signatures, while considering the question whether the arbitration agreement was signed by the petitioners, the fact that the agreement was admittedly sent by post on the address which was not the address of the petitioners, was a relevant fact, and this fact has been totally omitted

from consideration by the learned Arbitrator while recording the finding that the arbitration agreement is signed on behalf of the petitioners. In view of the the findings recorded above, I do not wish to make any comment on the arbitrator comparing the signature and then recording the finding that the arbitration agreement is signed on behalf of the petitioners. In the result, therefore, the present petition succeeds and is allowed. The Award impugned in the petition is set aside. The respondents are directed to pay cost of this petition to the petitioners as incurred by the petitioners.